

## EIGHTEENTH DAY.

(Continued.)

(Tuesday, August 18, 1931.)

The House met at 9 o'clock a. m., and was called to order by Speaker Minor.

## IN COMMITTEE OF THE WHOLE HOUSE.

(Mr. Minor in the chair.)

On motion of Mr. Graves, the House, at 9 o'clock a. m., resolved itself into a Committee of the Whole House for the purpose of considering impeachment charges against Judge J. B. Price.

## IN THE HOUSE.

(Mr. Minor in the chair.)

At 5:15 o'clock p. m., Mr. Minor, Chairman of the Committee of the Whole House, reported to the House that the Committee desired to rise, report progress, and ask leave of the House to sit again at 9 o'clock a. m. tomorrow.

## OPINION OF THE ATTORNEY GENERAL.

The following opinion of the Attorney General was ordered printed in the Journal:

Constitutional Law—Impeachment—Authority of House of Representatives to Remain in Session for Impeachment Purposes at End of Thirty-day Called Session—Compensation and Right to Hire Employees.

1. Where the Legislature is called in Special Session by the Governor, the House may consider the impeachment of a public official without submission by the Governor, impeachment being a judicial function, and may continue said hearing beyond the thirty-day limitation contained in Section 40 of Article 3 of the Constitution, that limitation referring solely to legislation.

2. Members of the House are entitled to compensation at the rate of ten dollars per diem for the duration of the hearing, so long as it, added to the Special Session, does not exceed 120 days in length.

3. The House, in exercising its judicial functions during an impeachment hearing, is of necessity authorized to employ such help as may be

necessary to the proper conduct of the proceedings.

Construing: Constitution—Article 15, Sections 1 and 2; Article 3, Sections 1, 24 and 40; Revised Civil Statutes, 1925, Title 100; H. C. R. No. 6, Regular Session, Forty-second Legislature; House bills Nos. 1 and 75, First Called Session, Forty-second Legislature.

Offices of the Attorney General,  
Austin, Texas, August 17, 1931.

Hon. Fred H. Minor, Speaker of the House of Representatives, Capitol Building, Austin, Texas.

Dear Sir: Your inquiry of the 15th instant addressed to Hon. James V. Allred, Attorney General, requesting an opinion of this department, has been received. The inquiry is in connection with certain proceedings now under way in the House of Representatives, as disclosed by the following statement of facts taken from your letter:

"The House of Representatives is now sitting for the purpose of hearing and considering charges of impeachment preferred against the Hon. J. B. Price, Judge of the Twenty-first Judicial District of Texas, which charges are shown on pages 551 to 557, inclusive, of the House Journal under date of July 31st, 1931.

"The resolution providing for the method and manner of conducting the investigation is set out at page 558 of the House Journal, and is in conformity with the resolutions adopted in previous sessions of the Legislature relating to the hearing of impeachment charges.

"The right of the House of Representatives to sit after the expiration of the thirty-day period of the First Called Session has been called in question, based upon Section 40 of Article 3 of the State Constitution, which reads as follows:

"Section 40. When the Legislature shall be convened in Special Session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session or presented to them by the Governor; and no such session shall be of longer duration than thirty days."

"The First Called Session of the Legislature convened on July 14th, 1931. On July 31st, the impeachment charges were preferred against Judge

Price, as above stated. The thirty-day period expired at midnight of August 12th. The House Concurrent Resolution relating to adjournment provided that while the House would stand adjourned for legislative purposes at midnight of August 12th, 1931, it would continue to sit for the purpose of hearing the impeachment charges against Judge J. B. Price, which had heretofore been filed, whereupon the House adjourned at midnight of August 12th so far as legislative matters were concerned, but adjourned until 9 o'clock a. m. of August 13th for the purpose of continuing the hearing of the impeachment charges, which hearing was in reality begun on the afternoon of August 12th. The adjournment resolution, as well as the motion for adjournment until the following day above referred to, were unanimously adopted, and pursuant thereto, the House has continued to sit from day to day, and is now in session for the purposes above herein set out."

Your first inquiry, based upon the foregoing statement of facts, reads as follows:

"(1) Is the House of Representatives authorized under the Constitution and laws to continue in session for the purpose of hearing the charges of impeachment now under consideration after the expiration of the thirty-day period in which the First Called Session of the Legislature sat for the consideration of legislative matters?"

In reply to the above-quoted inquiry, we desire to call your attention to certain constitutional and statutory provisions. Article 15 of the Constitution of the State of Texas deals with impeachment. Section 1 of said article reads as follows:

"The power of impeachment shall be vested in the House of Representatives."

Section 2 of said article is as follows:

"Impeachment of the Governor, Lieutenant Governor, Attorney General, Treasurer, Commissioner of the General Land Office, Comptroller and the Judges of the Supreme Court, Court of Appeals and district courts, shall be tried by the Senate."

The power of impeachment given the House of Representatives under the above constitutional provisions is limited as to the officers who may be

impeached, but is limited by no specific procedural provisions.

Article 3 of the Constitution of Texas deals with the legislative department. Section 1 of that article provides that the "legislative power" of the State shall be vested in a Senate and a House of Representatives, which together are styled "The Legislature of the State of Texas." In contrast, note that the provisions of Article 15 of the Constitution relate to "Impeachment" and vests said power, not in the Legislature, but in the House of Representatives. Section 40 of Article 3, quoted above in your letter, deals with the exercise of legislative power, and appears under that subhead of Article 3 (dealing with the legislative department) which treats of "proceedings." Be it noted that this refers to the proceedings of the legislative department of the State government, and in contrast note that Article 15, pertaining to impeachments, sets no procedural limitations. Section 29 to 58, inclusive, of Article 3 of the Constitution prescribe the proceedings, requirements, and limitations on the exercise of the legislative powers of the government by the legislative department. They have no application to the exercise of a judicial power, viz.: that of impeachment by the House of Representatives, which in impeachment matters sits as a judicial body.

The leading case on this question is a Texas Supreme Court case, and though that decision has support in other jurisdictions, we have been able to find no decision to the contrary. We refer to *Ferguson vs. Maddox*, 114 Texas 85, 263 S. W. 888, and quote as follows from page 891 of 263 S. W.:

"The powers of the House and Senate in relation to impeachment *exist at all times* (italics ours). They may exercise these powers during a regular session. No one would question this. Without doubt, they may exercise them during a special session, unless the Constitution itself forbids. It is insisted that such inhibition is contained in Article 3, Section 40. \* \* \* This language (of this article) is significant and plain. It purposely and wisely imposes no limitation, save as to legislation. As neither house acts in a legislative capacity in matters of impeachment, this section imposes no limitation with relation thereto, and the broad power conferred by Article 15 stands without

limit or qualifications as to the time of its exercise.

"From the inception to the conclusion of impeachment proceedings the House and Senate, as to that matter, are not limited or restricted by legislative session. \* \* \* At the end of a legislative session the House does not cease to exist, and its power, so far as its proper participation in a pending impeachment proceeding is concerned, is not affected, or the effect of what it has already properly done impaired.

"The fact that the impeachment trial may extend from one legislative session into another and cover parts of both is not material. The Constitution creates the court; it does not prescribe for it any particular tenure, or limit the time of its existence. By indubitable reason and logic it must have power and authority to sit until the full and complete accomplishment of the purpose for which it was created, limited, perhaps, by the tenure of office of the persons composing it."

The foregoing opinion is in full accord with a former opinion of this department appearing at page 427 of *Opinions of the Attorney General, 1916-1918*. That able opinion was written by the Hon. Luther Nickels of Dallas, then Assistant Attorney General and later Judge of the Commission of Appeals. A like conclusion was reached by the New York court in *People vs. Hayes*, 143 N. Y. Supp. 325, a case arising out of the impeachment and removal from office of Governor Sulzer. The New York court used this language in that case:

"It (the assembly) is the exclusive and final judge of the occasion or time it shall select to impeach, and the acts of the Governor it may specify as grounds for impeachment."

See also *Ex Parte Wolters*, 144 S. W. 531, and 46 *Corpus Juris* 1001.

Title 100 of the 1925 Revised Civil Statutes of Texas, mentioned by you in your letter, deals with removal of public officers, and Articles 5161 and 5163 thereunder deal with impeachment. Legislative authority is there found for the procedure now being followed by the House. The articles mentioned were enacted in pursuance of constitutional power. The Constitution having granted the impeachment power without restriction as to time, the Legislature, acting there-

under, has by legislation regulated to a certain extent the time of its exercise.

We deem the matter too well settled in Texas to admit of further discussion. It is settled by the Constitution, by statute and by judicial and departmental opinions. There is no dissenting voice; there can, in good reason, be none. The impeaching power is a judicial power, granted to the House of Representatives for exercise in those enumerated cases where the influence or official position of the accused is such that the ordinary processes of law would be ineffective to secure his removal. It is necessary for the preservation of pure government and to preserve the equal balance of power between the three co-equal departments of the government. If it be said that this practically unlimited power is subject to abuse, the answer is that the same observation is true of all grants of power. Except in the post-war Reconstruction Period, this nation has witnessed far less usurpation of constitutional power by its legislative than by its judicial bodies. In final analysis, the stability and constitutional functioning of all governments depends not upon mere forms, but upon the men who administer them. Our Constitution saw fit to grant this broad power to the Legislature despite the fact that it was framed by the very men who had suffered most from governmental tyranny during the trying Reconstruction Days. The Constitutional Fathers saw the necessity of creating a governmental body to act in impeachment matters sufficiently strong and free from local influence to give on the one hand an impartial trial, and on the other, to adequately protect the public.

In our opinion, and you are so advised, that whenever the Legislature meets in a regular or called session, the House may consider any impeachment matter thereat, and after expiration of the legislative session, may continue to hear the judicial matters (Impeachments) then pending before it. When the Governor calls a special session of the Legislature, he calls it to consider such legislative matters as he sees fit to submit and such judicial matters (Impeachments) as it sees fit to institute. The time for consideration of the legislative matters ends in thirty days; the time for considering an impeachment proceeding

then pending before the House expires only with the term for which that House is elected. The House may convene in regular session, called session, or in any of the modes set out in Article 5962, but once it enters into the consideration of a judicial matter, it sits without regard to the rules governing the legislative department and may continue its hearing until it sees fit to adjourn. In this respect, its power is exclusive, complete, final and subject to no review by any court or executive department. *State of Oklahoma ex. rel. Trapp, Acting Governor vs. Chambers*, 220 Pac. 890, 30 A. L. R. 1144. Your first question is answered in the affirmative.

Your second question reads as follows:

"(2) Will the members of the House be entitled to receive the sum of ten dollars per day as compensation while sitting for the purpose of hearing such impeachment charges, and if so, will the Speaker of the House be authorized to sign warrants therefor without further action of the House by resolution or otherwise providing for such compensation?"

Section 24 of Article 3 of the Constitution, as amended by proposal ratified November 4, 1930, reads in part, as follows:

"Members of the Legislature shall receive from the public Treasury a per diem of not exceeding \$10.00 per day for the first 120 days of *each session* (italics ours) and after that not exceeding \$5.00 per day for the remainder of the session \* \* \*."

House concurrent resolution No. 6, Regular Session, Forty-second Legislature, page 891, General Laws, Forty-second Legislature, fixes the pay of members of the Forty-second Legislature at \$10.00 per day for the first 120 days of the session and thereafter at the rate of \$5.00 per day for the remainder of the session. Article 5962, R. C. S. 1925, reads in part as follows:

"The members of the House and Senate, when either shall be sitting for impeachment purposes, and when not in session for legislative purposes, shall receive the per diem fixed for members of the Legislature during legislative sessions or out of the contingent funds of the respective houses, and the agents of the House

or Senate \* \* \* shall be paid as may be provided in the resolutions providing therefor out of said contingent funds."

It is fundamental that the Legislature could not, by law, provide for payment of compensation at an impeachment sessions at a rate higher than that permitted by the Constitution for legislative sessions. The statute quoted fixed the pay at the rate of compensation allowed during legislative sessions. The constitutional provision and the resolution referred to fix this rate at \$10.00 per day for the first 120 days of the session. This Department has previously held that the word "session" as used in the constitutional provision mentioned is broad enough to include an impeachment session of the House as well as a legislative session. *Opinions of Attorney General*, 1924-26, p. 329.

The expression "each session" as used in Section 24, of Article 3, of the Constitution means each and every session, including each special session. It does not limit the \$10.00 compensation to the first 120 days of an elective term during which the Legislature may be in session. It applies to each separate session of each duly elected Legislature. Such was the uniform legislative interpretation of Article 3, Section 24, before amendment, and since the same words are carried forward in the amended section, the point is too well settled to be questioned now. Your letter of inquiry contains this statement:

"No resolution has been passed, however (pertaining to this impeachment hearing), providing for the compensation of members of the House except a resolution passed during the early part of the Regular Session of the Forty-second Legislature, fixing the compensation at ten dollars per day."

It follows from what was said in response to your first inquiry that your present hearing is a continuation of the First Called Session of the Forty-second Legislature. The rate of compensation in this impeachment proceeding is fixed by the above-quoted resolution, statute, and constitutional provision. House bill No. 1 of the First Called Session of the Forty-second Legislature makes an appropriation of \$150,000 to pay the per diem and mileage of the members and other expenses of the First Called

Session of the Forty-second Legislature. House bill No. 75 of the First Called Session of the Forty-second Legislature makes an additional appropriation of \$50,000 for the same purposes. You may continue to sign warrants thereon for pay of the members so long as those two appropriations are not exhausted, since your present proceeding is a part (though a judicial, not a legislative part) of the First Called Session of the Forty-second Legislature. Attention is directed to those provisions of House bill No. 75, which expressly authorizes payment of per diem, etc., of "post-session" work of the First Called Session of the Forty-second Legislature. While you are not now in a "post-session," nevertheless the act evidences an intent to pay for the present work. Once these two appropriations are exhausted you will have no authority to draw warrants nor the House to make a further appropriation by resolution, even with concurrence of the Senate, for the appropriation of money is a legislative function which the Legislature is now powerless to exercise. Opinions of Attorney General, 1924-25, p. 283. In the event the aforementioned appropriations are exhausted before the present proceeding ends, the members of the House will have valid claims for mileage and per diem, based upon pre-existing law, for payment of which a subsequent Legislature could make a valid appropriation. Opinions of Attorney General, 1924-26, p. 329.

Your third inquiry reads as follows:

"(3) Under the conditions hereinabove set out, is the House entitled to retain employes during the time it shall continue to sit for the purposes hereinabove set out at the same compensation paid them during the thirty-day period it sat for the consideration of legislative matters, as provided for in the resolution hereinabove referred to, which was unanimously adopted by the House on August 14th, 1931, providing for the retention of such employes?"

While we do not have a copy of the resolution referred to, since it has not yet been printed in the Journal, we quote the following explanatory paragraph from your letter:

"On August 14th, the House pro-

vided a resolution for the retention of such employes as the Speaker might deem necessary, including stenographers, pages, porters and other employes, who shall receive the same compensation for their services as was paid during the thirty-day period in which the Legislature sat for the consideration of legislative matters, which resolution was unanimously adopted by the House, and pursuant to which all necessary employes have been retained."

The power of the House to sit during an impeachment hearing carries with it, by necessary implication, the power to employ such clerical help as may be necessary for the effective and efficient conduct of the hearing. Article 5962 expressly provides that the House when sitting for impeachment purposes, may employ agents to be paid as provided in resolutions of the House providing therefor out of any appropriations then existing or thereafter to be made. The House has express statutory authority, constitutionally granted, to retain employes during the present hearing and may pay them out of the appropriations heretofore made by House bills Nos. 1 and 75, passed during the legislative session of the First Called Session of the Forty-second Legislature. The simple House resolution of August 14 was not in any sense an appropriation. The appropriation had been previously made. The House must express its will in some manner in determining the number of employes necessary to be retained for the present hearing. It has done so by a simple resolution, passed in pursuance of express statutory authority. We answer your third question in the affirmative.

Very truly yours,

(Signed) R. W. YARBROUGH,  
Assistant Attorney General.

This opinion has been considered in conference, approved, and is now ordered recorded.

(Signed) BRUCE W. BRYANT,  
Acting Attorney General of Texas.

RECESS.

On motion of Mr. Johnson of Dimmit, the House, at 5:15 o'clock p. m., took recess to 9 o'clock a. m. tomorrow.